NO. D-1-GN-18-1605

MARCEL FONTAINE, *Plaintiff*,	§	IN THE DISTRICT COURT OF
V.	§	TRAVIS COUNTY, T E X A S
ALEX E. JONES, INFOWARS, LLC, FREE SPEECH SYSTEMS, LLC and KIT DANIELS, *Defendants*.	§	459th JUDICIAL DISTRICT

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION TO DISMISS UNDER THE TEXAS CITIZENS PARTICIPATION ACT

Defendants Alex Jones ("Jones"), Infowars, LLC ("InfoWars"), Free Speech Systems, LLC ("Free Speech") and Kit Daniels ("Daniels") (collectively, the "Defendants"), hereby file this Reply to Plaintiff's response to Defendants' "Motion to Dismiss under the Texas Citizens Participation Act" (the "Motion"), and show the Court the following in support:

I. OVERVIEW OF REPLY

1. As a threshold matter, Plaintiff has failed to establish any evidence - much less "clear and specific" evidence - of any actionable misconduct by Jones or InfoWars.[1] Instead, Plaintiff has generically lumped all of the defendants together (defining them collectively as "InfoWars") without any allegation or evidence as to any specific alleged misconduct by Jones or InfoWars for each of his claims. As such, his "legal actions" against Jones and InfoWars ***must be dismissed*** regardless of the Court's determination of Plaintiff's claims against the other two defendants (Daniels, the reporter, and Free Speech, his employer), and the Court must award sanctions and attorneys' fees to Jones and InfoWars for the dismissal of these legal actions against them.

[1] Plaintiff does not dispute - and thus concedes for purposes of the Motion - that the Defendants have satisfied their threshold burden to show that the TCPA applies to each of Plaintiff's "legal actions."

2. Similarly, Plaintiff's non-defamation "legal actions" (for intentional infliction of emotional distress ("IIED"), conspiracy and "respondeat superior") must also be dismissed because there is no "clear and specific" evidence to support them. On his IIED claim, Plaintiff fails to establish the requisite evidence to show any actionable extreme and outrageous conduct under Texas law. The sole evidentiary support his alleged "emotional distress" (his own affidavit) does not provide anything more than self-serving and conclusory allegations of his mental state, nor does it rise anywhere close to the high degree of mental pain and distress to support such a claim under Texas law. In any event, Plaintiff's IIED claim (which the Courts and Plaintiff recognize is a "gap filler" tort) is legally barred since it is based upon the same (and not additional, related) factual allegations as his defamation claim. As such, his IIED cause of action against all of the Defendants must be dismissed.

3. Plaintiff's conspiracy claim must also be dismissed. It is subject to dismissal under the TCPA (despite the single inapposite legal authority upon which Plaintiff relies), and there is absolutely no evidence to support the requisite elements of that "legal action." In addition, it is well established that corporate entities and their agents cannot conspire with themselves when they participate in corporate action. As such, that claim is also legally barred and must be dismissed as to all Defendants. Plaintiff's "respondeat superior" theory of liability also fails. There is no evidence that Daniels was an "employee" of Jones or InfoWars (a separate legal entity from Free Speech) or that he committed some tort during the scope of that employment. At most, the evidence shows that Daniels published the Challenged Image during the course and scope of his employment with Free Speech (not Jones or InfoWars).

4. Lastly, Plaintiff has failed to provide "clear and specific" evidence to support the elements of his defamation claim against Daniels and Free Speech. First, on the falsity element

and Defendants' statutory defense of truth, the record is devoid of falsity. Instead, the evidentiary record undisputedly shows that Daniels accurately reported the third-party allegations that he saw on social media -- namely, that the photo had been identified as the alleged Parkland shooter. Daniels and Free Speech have proven by a preponderance of the evidence their substantial truth affirmative defense under Texas Civil Practice Remedies Code Section 73.005(b). There is no authority that required Daniels to attribute those allegations to any particular source, and Plaintiff's common law authorities pre-dating this 2015 statute are legally erroneous and inapplicable. In addition, Defendants' voluntary retraction does not somehow operate as a deemed admission of falsity foreclosing its statutory substantial truth defense.

5. Second, on the "fault" element of his defamation claim, Plaintiff has failed to plead a negligence standard despite attempting to provide evidence of the same. There is also no "clear and specific" evidence of the heightened actual malice standard. The evidence - at best - shows an alleged failure by Daniels to independently investigate the social media sources from which the photo was published, which does not constitute actual malice under Texas law. Lastly, on injury, Plaintiff cannot rely upon the presumption of general damages afforded to plaintiffs in defamation *per se* cases because he has failed to establish clear and specific evidence of actual malice. As such, Plaintiff's defamation claim against Daniels and his employer (Free Speech) must be dismissed.

II. OBJECTIONS TO EVIDENCE

6. Defendants specifically object to the admissibility of the following evidence submitted by Plaintiff in opposition to the Motion and seek a ruling thereof:

(a) The ***Affidavit of Fred Zipp***, specifically including (i) the statements contained in the two paragraphs in the section entitled "Background Knowledge of InfoWars," pg. 2, (ii) the statements contained in the first paragraph on Pg. 7 (starting with "[t]his is not the first time), and (iii) the statements contained in the third paragraph on Pg. 8 (starting with "[i]n addition, I have reviewed"). These statements are irrelevant to the extent that they concern publications or conduct by one or more of the unspecified defendants that is completely unrelated to the Challenged Publication (in time or content) and which essentially constitute inadmissible character-type evidence. *See* Tex. R. of Evid. 401*; Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 858-59 (Tex. 2005); *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 173 (Tex. 2003) (observing that the actual malice inquiry focuses on the defendant's state of mind *at the time of publication)*. Mr. Zipp's attempt to "slime" Mr. Jones with allegations of unrelated activity is inadmissible to demonstrate the existence of actionable conduct in the matter before this Court.

(b) The ***Affidavit of Brooke Binkowski***, specifically including Paragraphs 11-14 - on grounds of relevance, lack of personal knowledge and because the statements contained therein are purely conclusory. Ms. Binkowski does not does affirm that she ever reviewed or saw the Challenged Publication or that she has any other personal knowledge about it. She does not purport to have any insight about Daniels' state of mind at the time of the Challenged Publication. She does not testify that she ever read or saw Mr. Daniels' declaration in support of the Motion. Instead, her conclusory statements in these paragraphs are based solely upon inadmissible character-type accusations.[2] *See* Tex. R. of Evid 401, 602; *Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 858-59 (Tex. 2005); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144,

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[2] The Motion contains similar references to various alleged articles published on the www.infowars.com website (the "Website") that have nothing to do with the Challenged Publication. Those unsupported factual assertions should be ignored and disregarded.

164-65 (Tex. 2004) (observing that evidence of actual malice - or lack thereof - must not be conclusory and should provide an explanation of the publisher's state of mind) .

III. ARGUMENTS AND AUTHORITIES

A. THERE IS NO EVIDENCE TO SUPPORT PLAINTIFF'S LEGAL ACTIONS AGAINST JONES AND INFOWARS

7. Plaintiff's pleading, arguments and evidence make no attempt to differentiate any particular alleged misconduct as between or among the four defendants. Obviously, it is Plaintiff's burden to establish a factual basis for the claims against each of the Defendants. Plaintiff cannot and has not done so. Plaintiff's causes of action for defamation and intentional infliction of emotion distress require some underlying actionable misconduct by the defendant and the requisite level of intent or fault. Here, Fontaine has failed to establish any evidence - much less clear and specific evidence - of a prima facie case for each essential element of these claims against Jones and InfoWars. There is no proof, nor even a pleading asserting, that Jones or InfoWars published the Challenged Image or engaged in conduct supporting any other independent tort (such as extreme or outrageous conduct required for an emotional distress claim), much less had the requisite intent for such alleged misconduct. Similarly, as set forth in detail below, Plaintiff does not provide any "clear and specific evidence" concerning Jones or InfoWars to support his so-called derivative theories of liability (including conspiracy and respondeat superior). As such, as a threshold matter, the Plaintiff's "legal actions" against these defendants must be dismissed. A demonstrative chart summarizing the complete absence of evidence of essential elements of Plaintiff's claims against Jones and InfoWars is attached hereto as **Exhibit 1**.

B. THERE IS NO CLEAR AND SPECIFIC EVIDENCE TO SUPPORT PLAINTIFF'S CLAIMS AGAINST DANIELS AND FREE SPEECH

(i) **Non-Defamation Claims: IIED, Conspiracy, Respondeat Superior**

(a) **Intentional Infliction of Emotional Distress**

8. To be considered "extreme and outrageous," conduct for an emotional distress claim under Texas law must "go beyond all possible bounds of decency and [] be regarded as atrocious and utterly intolerable in a civilized society . . . Liability does not extend to mere insults, indignities, threats, annoyances, petty oppression or other trivialities." *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004). Emotional distress includes embarrassment, fright, horror, grief, shame, humiliation, worry, and severe emotional distress that is so severe no reasonable person could be expected to endure it. *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 618 (Tex. 1999). Mere worry, anxiety, vexation, embarrassment, or anger are not enough, and there must be a high degree of mental pain and distress. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 443-44 (Tex. 1995); *Long Canyon Phase II & III Homeowners Ass'n, Inc. v. Cashion*, 517 S.W.3d 212, 223 (Tex. App.—Austin 2017, no pet.).

9. Courts have routinely dismissed emotional distress claims on TCPA motions to dismiss where, as here, the evidence is legally insufficient to demonstrate the heightened severity of distress required to sustain a claim. See *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (concluding that affidavit failed to satisfy TCPA's requirement of clear and specific evidence because it was conclusory and "devoid of any specific facts"); *David Martin Camp*, 2017 Tex. App. LEXIS 7258, at *29 (concluding that affidavit testimony of loss of sleep, loss of appetite, depression and anxiety was not "clear and specific" evidence of severity of emotional distress required on TCPA motion); *Long Canyon*, 517 S.W.3d at 223 (concluding that for purposes of TCPA motion to dismiss, assertions that plaintiffs suffered stress and severe emotional distress

and were annoyed and alarmed by defendant's conduct were not clear and specific evidence of emotional distress that approached requisite severity).

10. Here, Plaintiff does not -- and cannot -- offer any evidence of any conduct by any defendant that is so "extreme and outrageous" to support an IIED under Texas law. In addition, Plaintiff fails to offer required evidence of the severity of his emotional distress, any evidence that he sought professional help for such distress (medical, psychiatric treatment or otherwise) or how the alleged distress rose to the level that reasonable person could not be expected to endure it. He fails to explain how his emotional distress has disrupted his usual routine (such as its effect, in any, on any specific personal relationships or his job or employment). There is no evidence from any expert, any treating physician, any counselor or any other third-party (friend or even acquaintance) with knowledge of Plaintiff's alleged emotional distress. Plaintiff himself alleges only that he "decided to seek therapy" (in the future) -- not that he has actually sought therapy. In addition, Plaintiff does not make any attempt to show that his alleged emotional distress was the result of Daniel's publication of his image vs. the alleged pre-publication postings on social media that (according to Plaintiff's expert) mocked and made fun of Plaintiff. Lastly, Plaintiff does not cite a single case in which an IIED has survived a TCPA motion to dismiss -- on conclusory or self-serving allegations such as these - or otherwise, nor is the undersigned aware of one.

11. In addition, the Texas Supreme Court has limited the tort of intentional infliction of emotional distress to situations involving an egregious wrong that would otherwise be legally unprotected. *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004). The court described the tort as "a 'gap-filler' tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant **intentionally** inflicts severe

emotional distress in a manner so unusual that the victim has no other recognized theory of redress." Id. (emphasis added). Thus, "[w]here the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available." *Id.* At best, Plaintiff's evidence suggests that Daniels and Free Speech were negligent in not looking deeper in to the source of the photo, but it does not come close to establishing that either Daniels or Free Speech set out to harm the Plaintiff.

12. Where the factual allegations underlying an emotional distress and defamation cause of action are the same, and there are not any additional, unrelated factual allegations to support a cause of action for intentional infliction of emotional distress, the emotional distress claim must be dismissed. *See Warner Bros. Entm't, Inc.*, 538 S.W.3d at 798 (dismissing intentional infliction of emotional distress cause of action on TCPA motion); *Bilbrey v. Williams*, 2015 Tex. App. LEXIS 2359, at **13-14 (Tex. App.—Fort Worth Mar. 12, 2015, no pet.) (Holding that trial court should have dismissed intentional-infliction claim under TCPA because factual basis for claim was same as defamation claim,); *Young v. Krantz*, 434 S.W.3d 335, 344 (Tex. App.—Dallas 2014, no pet.) (same), disapproved of on other grounds by *In re Lipsky*, 460 S.W.3d 579 Tex. 2015). Here, there is no allegation or evidence that Plaintiff's IIED is based upon any facts that are different from his defamation claim. As such, his IIED claim is barred under Texas law and must be dismissed.

(b) ***Conspiracy.***

13. Contrary to the arguments asserted by Plaintiff, the Austin Court of Appeals (more recently than in the *Warner Bros* decision cited by Plaintiff) has specifically acknowledged that a conspiracy claim is considered a "legal action" and subject to the TCPA, thereby requiring a plaintiff to provide "clear and specific" evidence of the elements of such a

claim. *See Craig v. Tejas Promotions, LLC*, No. 03-16-00611-CV, 2018 Tex. App. LEXIS 3126, at *11 n.26 (App.—Austin May 3, 2018), citing *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 194 (Tex. App.—Austin 2017). Indeed, in that case, the appellate court affirmed the dismissal of the plaintiff's conspiracy claim because the plaintiffs had failed to present a prima facie case as to each essential element of "that theory of liability." *See Craig*, 2018 Tex. App. LEXIS 3126, at *14.

14. Other Texas courts are in agreement and have consistently held that a plaintiff asserting a conspiracy claim must provide clear and specific evidence of the essential elements of that claim to survive dismissal under the TCPA. *See Tu Nguyen v. Duy Tu Hoang*, No. H-17-2060, 2018 U.S. Dist. LEXIS 108073, at *82 (S.D. Tex. 2018) (granting TCPA motion to dismiss where there was insufficient evidence to make out a prima facie case of conspiracy); *MVS Int'l Corp. v. Int'l Adver. Sols.*, 2017 Tex. App. LEXIS 9556, at *27 (Tex. App.- El Paso, Oct. 11, 2017, no pet) (concluding trial court should have granted the TCPA motion on civil conspiracy claim); *Hicks v. Grp. & Pension Adm'rs, Inc.*, 473 S.W.3d 518, 533 (Tex. App.—Corpus Christi 2015) (reversing trial court and rendering judgment on motion to dismiss under the TCPA where plaintiff failed to establish a prima facie case on any essential element of its conspiracy claim); *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 287 (Tex. App.—Dallas 2015) (reviewing dismissal of conspiracy cause of action on TCPA motion).[3]

15. Here, Plaintiff has failed to make any showing of the essential elements of his conspiracy claim against any of the Defendants. In fact, Plaintiff does not specifically discuss

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[3] The *Warner Bros* case (the sole case upon which Plaintiff bases its argument that the Court does not need to examine the essential elements of a conspiracy claim) relies exclusively upon an inapposite Texas Supreme Court decision for this holding. *See Warner Bros.*, 538 S.W.3d at 813 (citing *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996)). That decision is procedurally inapposite because it was decided in a Plea to the Jurisdiction context, not a TCPA motion. Moreover, the parties in the *Warner Bros* case have filed a petition for review of that case with the Texas Supreme Court.

the elements of conspiracy or what evidence supposedly supports his conspiracy claim. For example, there is no evidence (much less "clear and specific evidence") that Defendants had a "meeting of the minds" on any particular object or course of action, that they took some unlawful, over act in furtherance of that object or course of action or that they caused Plaintiff injury as a result of such alleged conspiratorial activity. In any event, it is well settled law that a corporation and its agents cannot conspire with each other when they participate in corporate action (i.e. they are the acts of a single entity). *Fisher v. Yates*, 953 S.W.2d 370, 382 (Tex. App.- Texarkana 1997, pet. denied); *Editorial Caballero, S.A. de C.V. v. Playboy Enters.*, 359 S.W.3d 318, 337 (Tex. App.- Corpus Christi 2012, pet. denied) ("[A] company cannot conspire with its own employees as a matter of law."); *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 5 (Tex. App.- Corpus Christi 1991, no writ) (holding that, as a matter of law, a corporation cannot conspire with itself, no matter how many agents of the corporation participate in the alleged conspiracy). As such, based solely upon Plaintiff's pleading, his conspiracy claim is legally barred.

(c) ***Respondeat Superior.***

16. As explained above, Plaintiff has failed to provide any evidence that Daniels was an employee of Jones or InfoWars or that he committed a tort during the scope of that alleged employment. Contrary to Plaintiff's assertion, Daniels declaration confirms that he is an editor, video journalist and social commentator for defendant Free Speech (neither Jones nor InfoWars) and that he published the challenged publication on Free Speech's website (www.inforwars.com). In addition, there is no evidence controverting Daniels' sworn testimony that neither Jones nor InfoWars had any involvement with, or approval of, the content of the challenged publication.

(ii) **Defamation Claims**

(a) ***Falsity/Substantial Truth***

17. Plaintiff has failed to establish the essential element of falsity or, alternatively, Defendants have proven by a preponderance of the evidence the statutory defense of substantial truth. First, Daniels truthfully described the Challenged Image as an "alleged photo" of the Parkland shooting suspect, and Daniels and Free Speech have not somehow conceded the falsity of this statement because they later published an apology and retraction. There is simply no authority - nor does Plaintiff cite any - to support the legal argument that a defendant's retraction functions as a deemed legal admission or legally forecloses any argument that the challenged statement was truthful. Indeed, such an interpretation and result would contravene the public policy purposes of the Texas Defamation Mitigation Act -- to promote prompt mitigation by encouraging retractions. *See e.g., Hardy v. Commun. Workers of Am. Local* 6215, 536 S.W.3d 38, 47 (Tex. App.—Dallas 2017) (observing that the public policy objective of the DMA is to ensure prompt mitigation of injury and damage as well as possible avoidance of lengthy and expensive litigation). Indeed, if this interpretation were accurate, defamation defendants would be disincentivized to publish retractions for fear of their adverse legal effect in any subsequent litigation.

18. In any event, the evidence conclusively demonstrates that Plaintiff's defamation cause of action against Daniels and Free Speech is statutorily barred. Plaintiff does not dispute Daniels (as a media defendant) "accurate[ly] report[ed] allegations made by a third party regarding a matter of public concern" under the applicable statute. *See* Tex. Civ. Prac. & Rem. Code §§ 73.005(a), (b). This statute applies to the accurate reporting of allegations by a media defendant after May 27, 2015 and permits a defense of truth to such statements. *See* Acts 2015, 84th Leg. R.S.., ch. 191, § 2, eff. May 28, 2015). The statute does not require the media

defendant (Daniels) to specifically identify the source of the third party allegations in the challenged publication to obtain the statute's protection nor does the statute require the third party source meet some certain threshold of reliability for the publisher to obtain the benefit of this defense.

19. Notably, Plaintiff does not cite a single applicable authority challenging the statute's application in this context. Instead, Plaintiff's authorities (*Scripps*, *Warner Bros* and *Bentley*) are all based upon the common-law rule governing reports of third-party allegations published before the statute's May 28, 2015 effective date. That rule provided that a media defendant could not escape liability by arguing that the allegations were accurately reported. *See Neely v. Wilson*, 418 S.W.3d 52, 64-65 (Tex. 2013). The adoption of Section 73.005(b) legislatively reversed the pre-existing common law rule. As such, these authorities are wholly misplaced and legally inapplicable. Indeed, even a cursory read of the *Scripps* decision relied upon by Plaintiff would have demonstrated its obvious inapplicability. *See Scripps NP Operating, LLC v. Carter*, 2016 Tex. App. LEXIS 13519, at *37, n. 11 (Tex. App-Corpus Christi, Dec. 21, 2016) (observing that "the statute [73.005(b)] does not apply to Carter's suit because the articles at issue were published before the statute's effective date"). This statute functions as a complete bar to Plaintiff's defamation claim based upon undisputed evidentiary record.

(b) ***Fault.***

20. An actual malice determination focuses not on what the defendant should have done or did not do. *See Urban Eng'g v. Salinia Constr. Techs.,* 2017 Tex. App. LEXIS 4815 at *18-19 (Tex. App - Corpus Christi May 25, 2017, pet. denied) (finding trial court erred in denying motion to dismiss on defamation claim based upon a failure to investigate claim).

Neither does the determination focus on what a defendant would have known had it researched the matter. *Id.* "A failure to investigate fully is not evidence of actual malice[.]." *Bentley v. Bunton*, 94 S.W.3d 561, 593 (Tex. 2002); *Cox Tex. Newspapers L.P. v. Penick*, 219 S.W.3d 425 (Tex. App.-Austin, 2007, pet denied) (observing that publication of dubious information from a biased source was not sufficient to demonstrate actual malice). Instead, the focus is on the speaker's state of mind *at the time of the publication. See Forbes Inc. v. Granda Biosciences, Inc.*, 124 S.W.3d 167, 173 (Tex. 2003) (emphasis added).

21. Plaintiff has failed to present clear and specific evidence that Daniels either knew the statement to be false or entertained serious doubts as to the truth of the statement made at the time of publication. Whether or not Daniels should have investigated the reliability of the various social media accounts identifying the Challenging Image as the Parkland shooting suspect, whether he should have conducted a "reverse image" search or what his prior conduct was in other unrelated articles is not relevant to his of mind at the time of the publication nor any actual malice showing. In addition, although Plaintiff attempts to make out a prima facie case of negligence for his defamation claim, Plaintiff does not plead nor argue that a negligence standard applies. Instead, he pleads only actual malice. *See* Petition, ¶ 49.

(c) ***Injury***

22. A private plaintiff in a suit against a media defendant for speech that is alleged to be defamatory per se and involves a public concern is entitled to presumption of general damages *only if* the plaintiff can prove actual malice. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974); *MacFarland v. Le-Vel Brands, LLC*, 2017 Tex. App. LEXIS 2569, at *49-50 (Tex. App.-Dallas, Mar. 23, 2017) (discussing *Gertz* and concluding that general damages may be presumed in defamation per se cases only when the speech is not public or the plaintiff

proves actual malice). As discussed above, Plaintiff has failed to establish any clear and specific evidence of actual malice to support his defamation claim. In any event, as discussed above, Plaintiff's bare, conclusory and self-serving statements of alleged mental anguish (which are based upon the alleged viral republication of the Challenged Image across the internet by various unrelated third parties) - standing alone - fails to meet the "clear and specific" standard to avoid dismissal of his defamation claim. *See In re Lipsky*, 460 S.W.3d 579, 592 (Tex. 2015).

C. DEFENDANTS ARE ENTITLED TO A MANDATORY AWARD OF FEES AND SANCTIONS

23. Here, movants seek and are entitled to recover their reasonable attorneys' fees for the dismissal of ***any of*** Plaintiff's "legal actions." Movants have submitted fee testimony to support the imposition of a mandatory award of costs, fees and expenses in the amount of $64,675.00. *See* **Exhibit 2** (Supplemental Declaration of Kevin Brown). They also seek and are entitled to a mandatory award of sanctions on Plaintiff as required under the TCPA in an amount to be determined by the Court.

IV. PRAYER FOR RELIEF

WHEREFORE, Defendants respectfully requests that the Motion be granted, that they be awarded their attorneys' fees and a sanction against Plaintiff (pursuant to the TCPA), and the Court grant them such other and further relief as the Court deems equitable, just and proper.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the parties listed below via email and the Court's e-filing system on August 2, 2018:

Mark Bankston
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/s/ Eric J. Taube
Eric J. Taube

EXHIBIT 1

Fontaine v. Alex Jones, et al.
(**Exhibit 1** to Reply - Allegations or Evidence
for Elements of Claims Against InfoWars and Alex Jones)

Essential Elements of "Legal Actions"	InfoWars, LLC	Alex Jones
DEFAMATION		
An actionable "publication" by the defendant	**NONE**	**NONE**
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS		
Intentional or reckless conduct	**NONE**	**NONE**
Conduct that was extreme or outrageous	**NONE**	**NONE**
CONSPIRACY		
Defendant was a member of a combination	**NONE**	**NONE**
Intent (object of combination)	**NONE**	**NONE**
Meeting of the minds	**NONE**	**NONE**
Unlawful act in furtherance of object	**NONE**	**NONE**
RESPONDEAT SUPERIOR		
Tortfeasor employed by defendant	**NONE**	**NONE**
Tort committed while acting in course and scope of employment	**NONE**	**NONE**

EXHIBIT 2

NO. D-1-GN-18-1605

MARCEL FONTAINE,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, T E X A S
	§	
ALEX E. JONES, INFOWARS, LLC,	§	
FREE SPEECH SYSTEMS, LLC and	§	
KIT DANIELS,	§	
Defendants.	§	459th JUDICIAL DISTRICT

SUPPLEMENTAL DECLARATION OF KEVIN BROWN

I, Kevin Brown, do hereby declare under penalty of perjury that the following is true and correct.

1. My name is Kevin Brown. My date of birth is April 27, 1973, and my business address is Waller Lansden Dortch & Davis, LLP, 100 Congress, Suite 1800, Austin, Texas 78701. I am fully competent and capable in all respects to make this Declaration. I have personal knowledge of all of the facts stated in this Declaration, and they are true and correct. This supplemental declaration is submitted in connection with Defendants' Motion to Dismiss filed in the above-styled litigation.

2. I am an attorney duly licensed to practice law in the State of Texas and have been continuously since 2004. I have been licensed to practice law in New York since 1999. I am a partner with the law firm of Waller Lansden Dortch & Davis, which represents the Defendants in the above-styled litigation. A large portion of my practice has been devoted to litigation such as this in state and federal court.

3. The billing rate for this matter is $420 for me (a partner), $520 for Robb Harvey (a partner), $590 for Eric Taube (a partner), $300 for Andrew Vickers (an associate), $150 for

Ann Marie Jezisek (a paralegal), and $180 for Brenda Jones (a paralegal). I am familiar with rates charges by attorneys in Texas for litigation matters and these rates are reasonable when compared to customary rates in Texas for lawsuits such as this one.

4. The total fees incurred by our firm in connection with this matter between June 1, 2018 and July 31, 2018 is $30,637.50. These amounts include fees associated with compiling evidence and drafting declarations in connection with the Motion to Dismiss, further drafting and research in connection with the Motion to Dismiss, communications with Plaintiff's counsel regarding a hearing on the Motion to Dismiss, setting the Motion for hearing, reviewing Plaintiff's response to the Motion to Dismiss (including evidence submitted therewith), researching in connection with the Response, communicating with the clients concerning the Response and the Motion to Dismiss, drafting a Reply and preparing for the hearing on the Motion to Dismiss. Based upon the announced time for the hearing and anticipated preparation time, I believe and assert that we will incur additional fees of $5,000 through the hearing on the Motion to Dismiss.

5. Based upon my experience, I believe that the above amounts are reasonable and necessary for the services rendered based upon, among other things, the novelty and difficulty of the issues involved and the skill required to provide the legal services properly, the time and labor involved to perform the legal services properly, the fee customarily charged in the community for similar services, and the amounts involved and the results obtained.

6. As set forth in my previous declaration, the total fees incurred by our firm in connection with this matter between April 1, 2018 and May 31, 2018 is $29,037.50. Adding these figures brings the total fees incurred by our firm in connection with this matter through

July 31, 2018 to the amount of **$59,675.00** with an additional anticipated amount of **$5,000** through the conclusion of the hearing.

Executed in Travis County, State of Texas.

Kevin Brown
Dated: August 1, 2018